

**KULATUNGE
v.
PEIRIS**

SUPREME COURT
FERNANDO, J.
EDUSSURIYA, J. AND
WIGNESWARAN, J.
SC APPEAL NO. 5/2002
CA NO. 448/92 (F)
DC MT. LAVINIA NO. 673/Spl
MAY 07, 2002

Appeal – Power of the Court of Appeal pending an appeal to make an order for the preservation of the subject-matter of the action – Inherent power – Defendant's right to effect repairs to the house which is the subject-matter of suit.

The original plaintiff filed action for a declaration of title to the house in suit and for ejectment on the ground that the original defendant was a licensee whose licence had been duly terminated. The defendant pleaded a tenancy which plea the District Judge upheld and dismissed the action.

During the pendency of the action, the substituted defendant applied by way of a motion to effect temporary repairs to the house to preserve it against collapsing especially having regard to the condition of the roof. This was allowed by the Court of Appeal despite objections made on behalf of the substituted plaintiff-appellant.

Held:

- (1) The Court of Appeal has inherent power to restrain a party from destroying the subject-matter of the action, and also to authorize a party to take necessary steps (subject to such terms and conditions as the Court may prescribe) to preserve the subject-matter of the action.
- (2) The substituted defendant failed to make a proper application to the Court of Appeal invoking its inherent jurisdiction to make an order allowing her to make necessary repairs to the premises in suit. Such application should have been supported by affidavit and the Court should have given the substituted plaintiff an opportunity of being heard before making an order.

- (3) The defendant himself has the right to effect necessary repairs in the exercise of his rights under the tenancy or in terms of his obligations under the agreement or in terms of delictual obligations to third parties.

Cases referred to:

1. *Panchanan v. Dwarka* – 3 Cal LJ 29.
2. *De Silva v De Silva* – (1964) 68 NLR 45.
3. *Abeyaratna v. Perera* – (1912) 15 NLR 347.
4. *Sirinivasa Thero v. Sudassi Thero* – (1960) 63 NLR 31.

APPEAL from the judgment of the Court of Appeal.

A. K. Premadasa, PC with C. E. de Silva for substituted plaintiff-appellant.

P. P. Gunasena for substituted defendant-respondent.

Cur. adv. vult.

August 02, 2002

FERNANDO, J.

On 23. 05. 1982 the plaintiff-appellant-appellant (the plaintiff) instituted an action for declaration of title and ejection against the defendant-respondent-respondent (the defendant) in respect of a portion of premises No. 67/1, Galle Road, Dehiwala. The basis of that action was that the defendant was a licensee whose licence had been duly terminated. The defendant pleaded a tenancy from 1965. After trial, on 16. 07. 1992, the District Court upheld that plea and dismissed the action. The plaintiff appealed. The original plaintiff and defendant having died, substitution was effected in the course of the proceedings.

Nine years later the appeal was still pending in the Court of Appeal. The substituted defendant filed the following motion on 15. 10. 2001 :

". . .the subject-matter of this appeal is a house, and part of the house has already collapsed. But, the appellant prevents the respondent from repairing it temporarily at least until the finalization of this appeal . . .

The substituted defendant-respondent is 84 years old, and she respectfully seeks the permission of Your Lordships' Court to effect temporary repairs to the house to avoid the danger of serious bodily harm being caused to inmates."

The order made on 30. 10 2001 by the Court of Appeal was 20
as follows :

"Mr. Gunasena [Counsel for the substituted defendant] states that portion of the corpus . . . is now in a dilapidated state and the roof of the house may collapse at any moment and presently the [substituted defendant] has taken temporary measures to avert that, and . . . seeks from Your Lordships' Court [authority?] to make necessary arrangements to repair and avert the possibility of the house collapsing until the hearing of this appeal.

Mr. C. E. de Silva [Counsel for the substituted plaintiff] states that there is only a motion filed by [the substituted defendant] stating 30
that it requires . . . repairs and [objects] that this is a final appeal and there is no interim order that can be made allowing repairs.

The application of Mr. Gunasena is allowed. The substituted defendant is allowed to effect temporary repairs to the roof only to prevent the building from collapsing [and] is not entitled to claim any compensation for the said repairs."

The substituted plaintiff obtained special leave to appeal on two questions :

- (1) Whether there was proper application made to the Court of Appeal, invoking the jurisdiction of that Court for an order to effect repairs; 40
- (2) Whether there was evidence to satisfy the Court that the premises required urgent repairs.

This Court declined to stay the operation of the Court of Appeal order pending the final hearing and determination of the appeal.

Mr. A. K. Premadasa, PC on behalf of the substituted plaintiff, contended that the Court of Appeal had no jurisdiction to order or permit the repair of the subject-matter of the action, even if that was necessary for the preservation of the premises, and that the substituted defendant should have applied to the Rent Board for an order regarding repairs although an appeal was pending in the Court of Appeal. He also submitted that in any event there was no proper proof – even by way of a supporting affidavit – that the premises were in need of repairs. It was not his position that the substituted plaintiff desired the preservation of the premises – perhaps because the destruction of the premises might have resulted in the termination of the tenancy, if indeed there was one. 50

The first question for consideration is whether the Court of Appeal had jurisdiction to allow the substituted defendant to effect repairs to prevent the building from collapsing, ie to prevent the virtual destruction of the subject-matter of the action. 60

Our attention was not drawn to any express provision, statutory or otherwise which confers such a power on the Court of Appeal. Does the Court have an inherent power to make an order to prevent the destruction of the subject-matter of the action? Section 839 of

the Civil Procedure Code did not confer any new power, but was merely legislative recognition of an age-old and well-established principle that every Court has inherent power "to make such order as may be necessary for the ends of justice", ie to act *ex debito justitiae* to do that real and substantial justice for the administration of which alone it exists – see Sarkar, *Civil Procedure*, 8th ed, p. 482, citing *Panchanan v. Dwarka*.⁶⁰ Whatever the legal proceeding, it can truly be said that the ends of justice will be defeated if the party who is ultimately successful finds himself unable to enjoy the fruits of his victory because in the meantime the subject-matter of the action has been destroyed. Of course, such destruction may be due to the acts of a third party, or to other causes beyond the control of the parties and the Court, and it is not necessary to consider in this case what order the Court may make in such cases. The position is entirely different, however, where the impending destruction of the subject-matter is due to the act of a party or can be averted by the act of a party.⁷⁰

Section 54 of the Judicature Act empowers the District Court to grant an interim injunction restraining a party to an action from doing various acts "tending to render the judgment ineffectual". Undoubtedly, that would include an attempt to destroy the subject-matter of the action. Further, section 669 of the Code empowers a District Court to make an order for the preservation of any property which is the subject of a pending action – and that is independent of any attempt to destroy such property. The rationale for those provisions is clear;⁸⁰ the destruction of the subject-matter of the action would defeat the ends of justice. Although those provisions do not apply, expressly, to the Court of Appeal, where that Court is satisfied the destruction of the subject-matter of the action would tend to render the ultimate judgment in appeal ineffectual, and thereby defeat the ends of justice, I hold that the Court of Appeal does have inherent power to restrain

a party from destroying the subject-matter of the action, and also to authorize a party to take necessary steps (subject to such terms and conditions as the Court may prescribe) to preserve the subject-matter of the action.

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I wish to refer to two decisions in support of this conclusion. In *de Silva v. de Silva*,⁽²⁾ it was held that the District Court had inherent power to stay the sale of properties seized in execution of a writ where the judgment-debtor had made a revision application to set aside the decree – to avert the injustice which would otherwise be caused to the judgment-debtor if he succeeded and then found that his properties had been sold. In *Abeyaratna v. Perera*,⁽³⁾ a sale had taken place in accordance with the directions in a decree. It was held, despite the lack of express provision, that "the Court must have inherent power to render that sale effectual" by ordering delivery of possession to 100 the purchaser. Furthermore, in the present case, there is also the circumstance that the appeal had been pending for over nine years. Furthermore, it has been recognized that a Court has inherent power, and indeed is under a duty, to repair the injury done to a party by its own act : *Sirinivasa Thero v. Sudassi Thero*.⁽⁴⁾ In the exercise of its discretion, the Court must not ignore the prejudice caused by the delay in hearing an appeal.

The inherent jurisdiction of the Court of Appeal was not affected by the fact that the substituted defendant might have had a right to apply to the Rent Board, as submitted by Mr. Premadasa, because 110 *inter alia* that was not a judicial remedy, and the substituted defendant's status as tenant was disputed.

The next question is whether that jurisdiction was properly exercised. Apart from the unsubstantiated statement in her motion, the substituted defendant failed to place any evidence before the Court, at least by

way of affidavit, as to the nature and extent of the damage to the premises, and in particular to the roof. The facts were not admitted by the substituted plaintiff and she who was not given an opportunity of controverting the allegations in that motion.

Accordingly, I hold that the substituted defendant failed to make ¹²⁰ a proper application to the Court of Appeal invoking its inherent jurisdiction to make an order allowing her to make repairs necessary for the preservation of the premises in suit. The Court of Appeal should have directed her to make an application supported by affidavit, and should have given the substituted plaintiff an opportunity of being heard before making an order. The appeal must therefore be allowed.

However, a third question arises. Did the substituted defendant have a right to effect repairs, which right the Court of Appeal should have recognized in its order?

The District Court had held in 1992 that the defendant was a tenant. ¹³⁰ the substituted defendant was entitled to the benefit of that finding unless and until it was reversed on appeal. Accordingly, when her motion came up for consideration in the Court of Appeal it should have been considered on the basis that she was the tenant. A landlord is under a common law duty to ensure that the rented premises are not uninhabitable or dangerous. I do not have to consider whether that duty is subject to any modification where the rent of the premises is restricted by law so severely that it is insufficient to meet the cost of repairs. Besides, the substituted defendant does not make any claim to the costs of repair. Hence, whatever may be the position ¹⁴⁰ as to liability for the cost of essential repairs (necessary expenses), if the landlord does not effect such repairs so that there is a danger that the building may collapse, the tenant may attend to them himself – in the exercise of his rights under the tenancy agreement, or in

the discharge of his duty to mitigate the loss and damage which he would otherwise suffer, or in the fulfilment of his delictual obligations, owed in his capacity of occupier of the building, to prevent the building being a source of injury to third parties. In the normal course, such repairs ensure to the benefit of the owner.

For the above reasons, while allowing the appeal the order of the 150 Court of Appeal is varied as follows :

"The substituted defendant has the right, pending the appeal, to effect essential repairs to the roof to prevent the building from collapsing and is not entitled to claim any compensation for such repairs."

In the circumstances, I make no order for costs.

EDUSSURIYA, J. – I agree.

WIGNESWARAN, J. – I agree.

Appeal allowed subject to qualified relief to substituted defendant.